

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

J&J SPORTS PRODUCTIONS, INC.,

Case No. 12-cv-02278 JSW (NC)

Plaintiff,

v.

CHRISTINE JESENA,

**REPORT AND RECOMMENDATION
GRANTING DEFAULT JUDGMENT**

Re: Dkt. No. 12

Defendant.

Plaintiff J & J Sports moves for entry of default judgment under Federal Rule of Civil Procedure 55(b)(2) against defendant Christine Jesena, individually and doing business as Handaan Food Center, for Jesena's alleged violations of 47 U.S.C. § 605(a), 47 U.S.C. § 553(c)(3)(A)(ii), conversion of plaintiff's property, and violations of Cal. Bus. & Prof. Code § 17200. J & J Sports requests \$114,200.00 in damages.

The Court RECOMMENDS that the District Court GRANT J & J Sports' motion and enter default judgment against defendant, awarding \$9,400 in damages to plaintiff.

I. BACKGROUND

A. J & J Sports' Complaint

Plaintiff J & J Sports Productions is a closed-circuit distributor of sports and entertainment programming. Mot. Def. Judg. at 1, Dkt. No. 12-1; Gagliardi Decl. ¶ 3, Dkt. No. 16. J & J Sports owns the exclusive right to distribute on a nationwide basis a program titled *Manny Pacquiao v. Shane Mosley, WBO Welterweight Championship*

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REPORT AND REC. GRANTING

DEFAULT JUDGMENT

1 *Fight Program* (“the program”), which was televised nationwide on May 7, 2011.
 2 Compl. ¶ 14, Dkt. No. 1. J & J Sports entered into various sublicensing agreements with
 3 commercial entities, including entities in California, by which it granted these entities
 4 limited sublicensing rights, specifically the right to publicly exhibit the program within
 5 their respective commercial establishments. *Id.* ¶ 15. J & J Sports alleges it “expended
 6 substantial monies marketing, advertising, promoting, administering, and transmitting the
 7 program” to these commercial establishments. *Id.* ¶ 16.

8 Defendant Christine Jesena is an owner or operator of a commercial establishment
 9 doing business as Handaan Food Center in San Francisco, California. *Id.* ¶ 7-8. J & J
 10 Sports claims that Jesena personally, or by specifically directing employees of Handaan
 11 Food Center, intercepted and exhibited the program without authorization and for
 12 commercial gain. *Id.* ¶ 9-12. Investigator Mike Joffe went to Handaan Food Center on
 13 May 7, 2011 and observed the unlawful exhibition of the program at that establishment.
 14 Joffe Decl., Dkt. No. 12-3. In his declaration, Joffe states that he saw one television set at
 15 Handaan Food Center on which he watched the program. *Id.* at 2-3. Joffe conducted
 16 three headcounts during his visit and observed eighteen, twenty-one, and twenty-three
 17 customers respectively. *Id.*

18 J & J Sports filed a complaint against Jesena on May 4, 2012, alleging:
 19 (1) violation of the Federal Communications Act, 47 U.S.C. § 605; (2) violation of the
 20 Federal Communications Act, 47 U.S.C. § 553; (3) conversion; and (4) violation of
 21 California’s Business and Professions Code §§ 17200-17210. Compl. ¶ 13-41. J & J
 22 Sports served a copy of the complaint on Jesena on July 2, 2012. Dkt. No. 8. Jesena has
 23 filed no response to the complaint. The clerk entered default as to Jesena on August 8,
 24 2012. Entry Def., Dkt. No. 10.

25 **B. Motion for Default Judgment**

26 J & J Sports now moves for the entry of default judgment against Jesena under
 27 Federal Rule of Civil Procedure 55(b)(2). J & J Sports asserts that because the default
 28 entered by the clerk serves as an admission of the factual allegations in the complaint, the

only remaining issue is the amount of damages and costs to be awarded to J & J Sports. *Id.* at 8. J & J Sports seeks (1) \$10,000 in statutory damages under 47 U.S.C. § 605(e)(3)(C)(i)(II); (2) \$100,000 in enhanced damages under 47 U.S.C. § 605(e)(3)(C)(ii); and (3) \$4,200 in conversion damages. *Id.* at 8, 19-20; Riley Decl. ¶ 7, Dkt. No. 12-2. The default motion was referred to this Court by District Judge White for a report and recommendation under Federal Rule of Civil Procedure 72(a). Dkt. No. 14.

II. STANDARD OF REVIEW

“[D]efault judgments are generally disfavored. Whenever it is reasonably possible, cases should be decided upon their merits.” *Pena v. Seguros La Comercial*, S.A., 770 F.2d 811, 814 (9th Cir. 1985). “A district court’s decision whether to enter a default judgment is a discretionary one.” *Aldabe v. Aldabe*, 616 F.2d 1089, 1092 (9th Cir. 1980). In determining whether default judgment is appropriate, courts consider the following factors: (1) the possibility of prejudice to the plaintiff; (2) the merits of the plaintiff’s substantive claim; (3) the sufficiency of the complaint; (4) the sum of money at stake in the action; (5) the possibility of a dispute concerning material facts; (6) whether the default was due to excusable neglect; and (7) the strong policy underlying the Federal Rules of Civil Procedure favoring decisions on the merits. *Eitel v. McCool*, 782 F.2d 1470, 1471-72 (9th Cir. 1986).

III. DISCUSSION

A. Jurisdiction

When presented with a motion for default judgment, the court has “an affirmative duty to look into its jurisdiction over both the subject matter and the parties.” *In re Tuli*, 172 F.3d 707, 712 (9th Cir. 1999). Here, the Court has subject matter jurisdiction over this action under 28 U.S.C. § 1331 because the complaint alleges violations of the Federal Communications Act. Compl. ¶¶ 9-18. J & J Sports’ claims under California law are also properly before this Court under 28 U.S.C. § 1337, because they are so related to J&J Sports’ claims under federal law that they form part of the same case or controversy.

Jesena owns and operates Handaan Food Center, located in San Francisco. *Id.* ¶¶

1 7-8. As defendant resides and conducts commercial activities in this district, the Court
 2 may exercise personal jurisdiction over Jesena. *See Brayton Purcell LLP v. Recordon &*
 3 *Recordon*, 361 F. Supp. 2d 1135, 1138 (N.D. Cal. 2005) (“[t]his Court has the power to
 4 hear a case against a defendant who resides anywhere in this state.”).

5 **B. The *Eitel* Factors Support Entry of Default Judgment**

6 Considering all of the *Eitel* factors, the Court finds that the entry of default
 7 judgment is appropriate but that J & J Sports’ requested damages award is not supported
 8 by the factual allegations in the complaint.

9 **1. The Merits of J & J Sports’ Substantive Claim, Sufficiency of the
 10 Complaint, and the Possibility of a Dispute of Material Fact**

11 After entry of default, all well-pleaded factual allegations in the complaint are
 12 taken as true, except as to the amount of damages. *Fair Hous. of Marin v. Combs*, 285
 13 F.3d 899, 906 (9th Cir. 2002). The merits of plaintiff’s substantive claims, the
 14 sufficiency of the complaint, and the possibility of a dispute of material fact are thus
 15 considered together.

16 Although J & J Sports alleges violations of 47 U.S.C. § 605 and 47 U.S.C. § 553,
 17 as well as violations of California’s law against conversion and California Business and
 18 Professions Code §17200, J & J Sports’ pending motion for default judgment only seeks
 19 damages under § 605 and for conversion. *Compare* Compl., with Mot. Def. Judg. at 11,
 20 14, 20. J & J Sports has adequately alleged a violation of 47 U.S.C. § 605 and conversion
 21 by claiming that Jesena unlawfully intercepted and broadcasted the program for
 22 commercial gain and without paying J & J Sports its rightful license fee. *See* Compl.
 23 ¶¶ 11, 17-18, 29-30. Taken as true, these allegations are sufficient to establish a claim for
 24 violations of the Federal Communications Act and for conversion.

25 **2. The Sum of Money at Stake in the Action**

26 J & J Sports requests \$10,000 in statutory damages for violation of 47 U.S.C.
 27 § 605(e)(3)(C)(i)(II), and \$100,000 in enhanced damages for willful violation of 47
 28 U.S.C. § 605(e)(3)(C)(ii). Compl. ¶¶ 22, 27; Riley Decl. ¶ 7. With respect to its
 conversion claim, J & J Sports seeks \$4,200, the amount Jesena would have been required

1 to pay had she ordered the program from J & J Sports. Mot. Def. Judg. at 20; Riley Decl.
 2 ¶ 7. The Court considers each category of damages requested by J & J Sports and
 3 concludes that the amount requested is not entirely supported by the record.

4 **a. Statutory Damages**

5 Under 47 U.S.C. § 605(e)(3)(C)(i), an aggrieved party may recover actual damages
 6 or statutory damages at the court's discretion of no less than \$1,000 or more than \$10,000
 7 for each violation. J & J Sports' request for statutory damages is appropriate here,
 8 because, as a result of Jesena's default, it would be impracticable to calculate the actual
 9 amount of damages suffered by J & J Sports. The Court finds that J & J Sports is entitled
 10 to \$4,200 in statutory damages under § 605, as this is the amount that Jesena would have
 11 had to pay to purchase a license from J & J Sports. *See J & J Sports Prods. v. Kim Hung*
 12 *Ho*, No. 11-cv-01163 LHK, 2012 U.S. Dist. LEXIS 5470, at *4 (N.D. Cal. Jan. 18, 2012)
 13 (awarding statutory damages under § 605 based on the cost of the program's license).

14 **b. Enhanced Damages**

15 J & J Sports also requests \$100,000 in enhanced damages under 47 U.S.C.
 16 § 605(e)(3)(C)(ii). Compl. ¶ 22. That provision gives the court discretion to increase the
 17 award of damages to the aggrieved party by an amount of no more than \$100,000 for each
 18 violation in the event that the court finds a willful violation for purposes of commercial
 19 advantage or personal gain. 47 U.S.C. § 605(e)(3)(C)(ii).

20 J & J Sports asserts that the program was available only through the purchase of a
 21 commercial sublicense from J & J Sports and that Jesena did not purchase such a
 22 sublicense. Gagliardi Decl. ¶ 9. J & J Sports contends that Jesena therefore acted
 23 willfully and for commercial gain, warranting an award of enhanced damages. Mot. Def.
 24 Judg. at 15, 20.

25 The Court finds that in the absence of a lawful license, the evidence suggests that
 26 Jesena willfully obtained the program. J & J Sports, however, has not submitted any
 27 evidence of "commercial advantage or private financial gain." *See* 47 U.S.C. §
 28 605(e)(3)(C)(ii). In determining whether a defendant acted for the purpose of commercial

1 advantage, courts consider a number of factors including: any promotional advertising by
 2 the defendant, the capacity of the establishment, the number of patrons present at the time
 3 of the broadcast, the imposition of a cover charge, the number and size of the televisions
 4 used for the broadcast, and whether a premium was charged on food or drink. *See J & J*
5 Sports Prods. v. Sorondo, No. 11-cv-00411 AWI (SMS), 2011 U.S. Dist. LEXIS 99951,
6 at *10-11 (E.D. Cal. Sept. 6, 2011) (citing *Kingvision Pay-Per-View, Ltd. v. Backman*,
7 102 F. Supp. 2d 1196, 1198 (N.D. Cal. 2000)). Courts in this district have found modest
8 enhancements proper when the case involved a limited number of patrons where the
9 establishment charged a cover charge. *See, e.g., Garden City Boxing Club, Inc. v. Lan*
10 *Thu Tran*, No. 05-cv-05017 RMW, 2006 U.S. Dist. LEXIS 71116, at *5-6 (N.D. Cal.
11 Sept. 20, 2006) (awarding \$1,000.00 in statutory damages and \$5,000.00 in enhanced
12 damages when 40 patrons were present and a \$10.00 cover charge was imposed).

13 Here, the investigator asserts that he was charged a \$10 “cover charge” to enter the
 14 establishment, yet he also states that this fee “included food.” Joffe Decl. at 2. In
 15 addition, the investigator observed at most 23 persons inside the establishment, which had
 16 the capacity to hold 70 to 75 persons. *Id.* at 3. Moreover, the investigator stated that the
 17 establishment had only one, 22-inch television set sitting on top of an empty fish tank. *Id.*
 18 There is no evidence that the establishment was doing any greater level of business on the
 19 night of the fight than at any other time. Finally, J & J Sports has presented no evidence
 20 to the Court suggesting that defendant is a repeat broadcast piracy offender. Under these
 21 circumstances, the Court finds that plaintiff is entitled to \$1,000.00 in enhanced damages.

22 c. Conversion

23 J & J Sports also requests \$4,200 in conversion damages. Under California Civil
 24 Code § 3336, damages for conversion are based on the value of the property at the time of
 25 the conversion. J & J Sports claims that the value of a license to exhibit the program is
 26 \$4,200. Mot. Def. Judg. at 20; Gagliardi Decl. ¶ 8, Ex. 1. Accordingly, the Court finds
 27 that J & J Sports is entitled to recover the \$4,200 licensing fee. *See Kim Hung Ho*, 2012
 28 U.S. Dist. LEXIS 5470 at *4 (awarding conversion damages in addition to statutory

1 damages under § 605).

2 **3. Remaining *Eitel* Factors**

3 The Court considers the remaining *Eitel* factors below. The first *Eitel* factor, the
 4 potential prejudice to J & J Sports absent default judgment, weighs in favor of entering
 5 default judgment against defendant. First, if the District Court denies this motion, J & J
 6 Sports will not have a remedy for the harm it suffered as a result of Jesena's alleged acts
 7 or the ability to prevent similar acts by defendants in the future. Second, J & J Sports
 8 argues that it has lost and will continue to lose customers as a result of Jesena's alleged
 9 conduct, suggesting that when commercial establishments provide programming illegally
 10 to their patrons at no charge, paying establishments cannot attract paying customers to
 11 offset their sizeable investments in commercial licensing, and are therefore discouraged
 12 from paying a licensing fee to J & J Sports. Mot. Def. Judg. at 21. Finally J & J Sports
 13 asserts that as a result of piracy, it has suffered "severe damage to its goodwill and
 14 professional reputation." *Id.*

15 The sixth *Eitel* factor, whether defendant can display excusable neglect, also
 16 weighs in favor of entering default judgment against Jesena, as she did not file a response
 17 to the complaint, and there is no evidence that her failure to do so was due to excusable
 18 neglect. Finally, as for the seventh *Eitel* factor, the strong policy favoring decision on the
 19 merits, although weighing against entering default judgment, it does not appear that
 20 litigation of the merits will be possible in this case due to Jesena's failure to litigate.

21 J & J Sports has had hundreds of these cases heard in this district. Under the
 22 circumstances provided in this case, an award of \$9,400 is consistent with other default
 23 judgments awarded in this district. *See, e.g., J & J Sports Prods. v. Ayala*, No.
 24 11-cv-05437 EJD, 2012 U.S. Dist. LEXIS 133433, at *10 (N.D. Cal. Sept. 17, 2012)
 25 (awarding \$9,700 in total damages); *J&J Sports Prods., Inc. v. Bonilla*, No. 10-cv-05140
 26 LHK, 2011 U.S. Dist. LEXIS 40602, at *7 (N.D. Cal. Apr. 8, 2011) (awarding \$6,600 in
 27 total damages); *J&J Sports Prods. v. Paniagua*, No. 10-cv-05141 LHK, 2011 U.S. Dist.
 28 LEXIS 33940, at *7 (N.D. Cal. Mar. 21, 2011) (awarding \$8,800 in total damages). In

1 sum, the Court finds the *Eitel* factors weigh in favor of granting default judgment against
2 Jesena for a total amount awarded of \$9,400.

3 **IV. CONCLUSION**

4 The Court RECOMMENDS that the District Court GRANT J & J Sports' motion
5 for entry of default judgment against defendant Jesena and that it award to J & J Sports
6 \$4,200 in damages under 47 U.S.C. § 605(e)(3)(C)(i)(II), \$1,000 in enhanced damages
7 under 47 U.S.C. § 605(e)(3)(C)(ii), and \$4,200 in damages under California Civil Code
8 § 3336, for a total of \$9,400. Any party may object to this order under Federal Rule of
9 Civil Procedure 72(a) within fourteen days of the filing date of this order.

10 IT IS SO ORDERED.

11 DATED: January 11, 2013

12 
13 NATHANAEL M. COUSINS
14 United States Magistrate Judge